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No. 88-256

In the Supreme Court of the United States

OCTOBER TERM, 1988

M.M. WINTER, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a decision of the Interstate Commerce Commission is nonfinal, and therefore nonreviewable, when the party seeking judicial review has petitioned the Commission to reopen its decision.

2. Whether the Commission's initial decision to accept a railroad's notice of a trackage rights transaction that is exempt from Commission regulation, subject to later proceedings to determine whether to revoke the exemption, is a reviewable order.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 851 F.2d 1056. The January 7, 1988, order of the Interstate Commerce Commission denying petitioner's petition for rejection of the exemption for the Winona Bridge Railway Company trackage rights filing (Pet. App. 20a-29a), and the March 7, 1988, order of the Commission denying a stay pending judicial review (Pet. App. 30a-37a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1988. The petition for a writ of certiorari was filed on August 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner contends that the court below erred in holding that a decision of the Interstate Commerce Commission was not a final and reviewable order because petitioner had a pending petition to reopen the Commission's decision, and because petitioner was challenging the Commission's initial acceptance of a trackage rights exemption filing that was subject to later, and more extensive, revocation proceedings.

1. On November 16, 1987, the Winona Bridge Railway Company (Winona) agreed to acquire certain "bridge" trackage rights from its parent company, Burlington Northern Railroad Company (Burlington), which would permit Winona to operate over approximately 1,860 miles of Burlington line between Winona Junction, Wisconsin and Seattle, Washington without serving customers along the route (Pet. App. 2a-3a, 20a). A trackage rights agreement is an arrangement between rail carriers that permits one carrier to conduct operations over tracks owned by another (Pet. App. 3a & n.4). Under the Interstate Commerce Act (49 U.S.C. (& Supp. III) 10101 *et seq.*), the Commission ordinarily must find that an acquisition of trackage rights is "consistent with the public interest" and must approve it before the transaction becomes effective (49 U.S.C. 11343(a)(6), 11344). In 1980, however, Congress directed the Commission in the Staggers Act to "exempt" from regulation transactions that otherwise require approval under the Interstate Commerce Act when the Commission finds that regulation is not necessary to carry out national rail transportation policy and certain other conditions are met (*id.* at 10505(a)).[1] Acting under that

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[1] Congress established two statutory criteria for exemption of a "transaction" from a provision of the Interstate Commerce Act (49 U.S.C. 10505). The Commission must find that applying the provision

authority, the Commission has exempted trackage rights agreements (with certain exceptions not relevant here) from the general requirement of advance approval by the Commission.[2] *Railroad Consolidation Procedures—Trackage Rights Exemption*, 1 I.C.C. 2d 270 (1985) (promulgating 49 C.F.R. 1180.2(d)(7) and 1180.4(g)(2)). The Commission's trackage rights exemption was upheld in *Illinois Commerce Commission* v. *ICC*, 819 F.2d 311 (D.C. Cir. 1987).

Because of the trackage rights exemption, a railroad may implement a trackage agreement seven days after the railroad files a verified notice of it with the Commission containing specified information about the transaction (49 C.F.R. 1180.4(g)(1)). Interested parties may challenge exempt trackage rights agreements, however, by filing a petition to revoke the exemption, and the Commission may revoke the exemption "when it finds that application of [the Interstate Commerce Act] * * * is necessary to carry out the transportation policy of section 10101a of [title 49]" (49 U.S.C. 10505(d)). By regulation, "[t]he filing of a petition to revoke * * * does not stay the effectiveness of an exemption" (49 C.F.R. 1180.4(g)(3)).

2. On November 18, 1987, Winona filed a notice with the Commission of its exempt trackage rights arrangement with Burlington (Pet. App. 6a, 20a). On November 25,

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to the transaction "(1) is not necessary to carry out the transportation policy" set forth in 49 U.S.C. 10101a; and "(2) either (A) the transaction * * * is of limited scope, or (B) the application of [the provision in question] is not needed to protect shippers from the abuse of market power." 49 U.S.C. 10505(a).

[2] The exemption covers the "[a]cquisition of trackage rights and renewal of trackage rights by a rail carrier over lines owned or operated by any other rail carrier or carriers that are: (i) based on written agreements, and (ii) not filed or sought in responsive applications in rail consolidation proceedings" (49 C.F.R. 1180.2(d)(7)).

1987, the trackage rights agreement became effective (*ibid.*).[3] On December 2, 1987, petitioner, the General Chairman of the United Transportation Union (UTU), which represents certain of Burlington's employees, filed a petition seeking either rejection of the Winona filing or revocation of the exemption, or both (*id.* at 7a.).[4] Petitioner argued, inter alia, that Winona was not a rail carrier for which the trackage rights exemption was available because Winona was allegedly an out-of-service railroad bridge, not a "person providing railroad transportation for compensation" pursuant to 49 U.S.C. 10102(20) (Pet. App. 7a, 22a).

On January 7, 1988, the Commission denied petitioner's threshold request to reject the Winona exemption notice (Pet. App. 20a-29a). The Commission considered petitioner's contentions that Winona "does not provide, and has never provided, transportation," but found that petitioner "has not presented any evidence to permit us to resolve definitively" Winona's status on the record before it (*id.* at 24a). The Commission added that "in the interests of addressing [petitioner's] petition[], we have not waited for replies" from Winona and Burlington, but nevertheless noted that Winona "could be found to have a residual common-carrier obligation" (*ibid.*). The Commission thus denied the petition to reject Winona's notice, but deferred its ruling on the request for revocation of the exemption. The Commission expressly left to a later decision, after "Winona has had an opportunity to respond," the con-

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[3] The Commission served the notice of exemption and published it in the Federal Register on December 4, 1987 (52 Fed. Reg. 46129) (Pet. App. 20a).

[4] On November 25, 1987, the Railway Labor Executives' Association (RLEA) had filed a separate petition to void, revoke or stay the exemption (Pet. App. 6a). The Brotherhood of Locomotive Engineers filed a third petition for revocation (*id.* at 21a).

sideration of "the merits of petitioners' revocation requests" (*ibid.* (emphasis added)).[5]

On January 19, 1988, petitioner filed a petition with the Commission to reopen its January 7th decision (Pet. App. 2a). Before the Commission had acted on that petition, on February 17, 1988, petitioner also sought judicial review of the Commission's January 7th decision in the court of appeals (Pet. 5). Petitioner's union, the UTU, also requested that the Commission stay Winona's exemption pending judicial review, and the Commission denied that request on March 7, 1988 (Pet. App. 30a-33a). In its opinion denying a stay, the Commission stated that UTU was not likely to prevail on judicial review, and added (*id.* at 31a): "[m]oreover, the January 7th decision is not ripe for [judicial] review because the Commission at this time has neither ruled on the pending revocation and reopening requests nor considered [Winona's] response to the labor unions' arguments."[6]

3. On May 13, 1988, the court of appeals dismissed petitioner's petition for review "for want of a final order" (Pet. App. 19a).[7] In its opinion, filed on July 12, 1988, the

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[5] Vice Chairman Lamboley dissented and would have stayed the exemption pending development of the record (Pet. App. 25a-29a). Commissioner Simmons also dissented. He would have stayed the transaction between Winona and Burlington and instituted notice and comment proceedings (*id.* at 29a). Neither dissent argued that the Commission should have rejected Winona's filing on the record before it.

[6] The Commission also concluded that Burlington employees would not be irreparably harmed even if the January 7th decision were set aside on judicial review, whereas a stay would cause substantial harm to Winona and the shipping public and was not in the public interest (Pet. App. 32a).

[7] The court also vacated a stay of the Commission's action that it had granted earlier (Pet. App. 19a).

court explained that it was "convinced that under the circumstances of this case," this Court's decison in *ICC* v. *Brotherhood of Locomotive Engineers*, No. 85-792 (June 8, 1987), "stands for the proposition that once the unions filed petitions to reopen and to revoke the exemption, the original *January 7 Decision* became nonfinal" and, therefore, not subject to judicial review (Pet. App. 12a (emphasis in original)).

The court also held that the Commission's January 7th order was not reviewable because it was not a final administrative decision on the trackage rights transaction. Citing *Papago Tribal Utility Auth.* v. *FERC*, 628 F.2d 235 (D.C. Cir.), cert. denied, 449 U.S. 1061 (1980), the court stated that "[t]he decision to accept a filing * * * merely initiates the administrative process" and it "decides nothing about the merits of the case" (Pet. App. 13a). The court observed that the acceptance of the filing "is quickly made without time for considered judgments on the law or the facts, and gives the reviewing court no factual record to examine" (*ibid.*). Judicial review of that preliminary action would be "cumbersome and inappropriate" because it would force the court to decide "without the benefit of the Commission's views on relevant question[s] of law and regulatory policy" (*ibid.*). The court thus concluded that it was "bound by the doctrine of finality and the statutory scheme of the Staggers Act, which provides for challenges to the Commission's actions through revocation proceedings after the transaction has been consummated" (*id.* at 14a).

The court also rejected the argument that it could invoke the All Writs Act, 28 U.S.C. 1651, to review the otherwise non-final order before it (Pet. App. 16a). The court recognized that "[j]urisdiction must be clearly lacking to justify issuance" of an extraordinary writ, and this case did not satisfy that exacting standard (*id.* at

16a-17a). The court concluded that the Commission's denial of the petition to reject Winona's exemption did "not constitute a clear abuse of discretion or usurpation of power" (*id.* at 17a).

One member of the panel dissented, finding it "inescapably clear" on "the information presented to the Commission," that Winona was not a rail carrier, but rather was the "owner of a defunct * * * river bridge" (Pet. App. 17a). Without discussion of the interim nature of the order before it or the pending petition for the Commission to reopen its January 7th decision, the dissent expressed the view that there was a "clear jurisdictional defect" warranting relief (*id.* at 18a).[8]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. This Court's recent decision in *ICC* v. *Brotherhood of Locomotive Engineers*, No. 85-792 (June 8, 1987), establishes that the filing of a petition to reopen an agency decision makes that decision nonfinal for purposes of judicial review. In *Brotherhood of Locomotive Engineers,*

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[8] The Commission is actively deliberating about petitioner's petitions to reopen its January 7th order and to revoke Winona's exemption. Although Winona's exemption is administratively effective at present, a district court has enjoined the consummation of the trackage rights agreement on the ground that it violates the Railway Labor Act, 45 U.S.C. 101 *et seq. Burlington Northern R.R. Company* v. *United Transportation Union International*, No. 88 C 2687 (N.D. Ill. filed June 13, 1988), appeal pending, No. 88-2180 (7th Cir. argued Sept. 9, 1988).

a union sought judicial review of two Commission orders: the first, the Commission's denial of a petition for "clarification" of a final order, and the second, the Commission's denial of a petition for "reconsideration" of the first denial on grounds that it was materially incorrect. The Court held that neither order before it was reviewable (slip op. 9, 13). The Court first explained that "[w]ith certain exceptions that are not relevant here, judicial review of final orders of the ICC is governed by the Hobbs Act, which provides that any party aggrieved by 'a final order' of the Commission 'may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies' " (*id.* at 5 (citations omitted)).[9] The Court then held that the Commission's denial of a petition for reconsideration is not a reviewable order under the Hobbs Act, when the petition simply argues that the original decision was materially incorrect (slip op. 5-9). The Court reasoned that an appeal from the denial of such a timely-filed petition for reconsideration "serves no purpose whatever * * * since in that situation the petition tolls the period for judicial review of the original order, which can therefore be appealed to the courts *directly* after the petition for reconsideration is denied" (*id.* at 7-8) (emphasis in original).

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[9] The Hobbs Act, 28 U.S.C. 2341 *et seq.*, provides that "the court of appeals * * * has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of * * * (5) all * * * final orders of the Interstate Commerce Commission made reviewable under section 2321 of this title" (28 U.S.C. 2342(5)). Any "party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies" (28 U.S.C. 2344). 28 U.S.C. 2321(a) provides that "a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the [Commission] shall be brought in the court of appeals" in accordance with the Hobbs Act.

The Court further considered the language of the Interstate Commerce Act providing that an order is "final on the date * * * served," and that, "notwithstanding" the Commission's power to reopen its orders, "a civil action to enforce, enjoin, suspend, or set aside the action may be filed after that date" (slip op. 12 (citing 49 U.S.C. 10327(i)). The Court rejected the argument that those provisions make a Commission order reviewable despite a pending request for reconsideration (slip op. 12-13).[10] Although those provisions "would seem to mean that the pendency of reconsideration motions does not render Commission orders nonfinal for purposes of triggering the Hobbs Act limitations periods" (*ibid.*), the Court found no basis for interpreting the Hobbs Act differently from the similar provision of the Administrative Procedure Act (5 U.S.C. 704) that an order "otherwise final is final [for purposes of review] * * * whether or not there has been presented or determined an application for * * * any form of reconsideration" (slip op. 12-13). The Court stated that the APA's "language has long been construed by this and other courts merely to relieve parties from the *requirement* of petitioning for rehearing before seeking judicial review * * * but not to prevent petitions for reconsideration that are actually filed from rendering the orders under reconsideration nonfinal" (*id.* at 13 (emphasis in original)). The

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[10] The Court had to reach this argument to determine whether the union had made a timely request for review of the Commission's refusal of its "petition for clarification" (slip op. 12). Because more than 60 days had elapsed since the denial of clarification, if that order had been "final," and thus reviewable, regardless of the petition for reconsideration, the union's petition for judicial review of it would have been untimely (*ibid.*).

Court found the same doctrine applicable to the Hobbs Act (*ibid.*).[11]

The Court's logic in *Brotherhood of Locomotive Engineers* compels the conclusion that the court of appeals drew in this case. Just as in *Brotherhood of Locomotive Engineers*, petitioner's request for reopening in this case "tolls the period for judicial review of the original order," and enables it to "be appealed to the courts *directly*" when and if the Commission refuses to reopen. In the interim, petitioner's request to reopen plainly renders "the orders under reconsideration nonfinal." (*Brotherhood of Locomotive Engineers*, slip op. 13).[12] This result is consis-

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[11] Petitioner offers no basis for his suggestion (Pet. 11) that the Court's holding of "nonfinality" for purposes of the Hobbs Act's 60-day limitations period (28 U.S.C. 2344) does not apply with equal force to the requirement of finality for court of appeals review, established in another section of the Hobbs Act (28 U.S.C. 2342(5)). Indeed, it would be extremely incongruous if the same order were "final" for purposes of jurisdiction to seek judicial review but "nonfinal" for purposes of the 60-day limitations period. Petitioner's construction would make *no* limitations period applicable to a petition for judicial review of an order under reconsideration by the agency, contrary to the plain language of the statute providing a 60-day period within which to seek judicial review.

[12] Petitioner's reliance (Pet. 9) on *Eagle-Picher Industries* v. *EPA*, 759 F.2d 905 (D.C. Cir. 1985), offers petitioner no support, as that case involved only the dismissal of an appeal by a party who had mistakenly assumed that a final order was not ripe and therefore had delayed seeking review until after the statutory period had run, not one who sought both administrative and judicial review simultaneously.

Petitioner also relies (Pet. 10) on the current docketing statement of the United States Court of Appeals for the District of Columbia Circuit as evidence that the ruling below is inconsistent with "settled practice" (*ibid.*). The information sought by the docketing statement about pending requests for reconsideration simply enables the court to determine whether it lacks jurisdiction because the order on appeal is not final.

tent with the settled practice of the courts of appeals. See *Texas* v. *United States*, No. 86-4430 (5th Cir. July 2, 1986) (per curiam); *C.O.D.E., Inc.* v. *ICC*, 768 F.2d 1210, 1211-1211 (10th Cir. 1985); *Aeromar, C. Por. A.* v. *Dep't of Transportation*, 767 F.2d 1491, 1493 (11th Cir. 1985); *Cities of Newark, New Castle & Seaford* v. *FERC*, 763 F.2d 533, 544, 545 (3d Cir. 1985); *California Tribal Chairman's Ass'n* v. *United States Dep't of Labor*, 730 F.2d 1289, 1290-1291 (9th Cir. 1984); *Cartersville Elevator, Inc.* v. *ICC*, 724 F.2d 668, 672, aff'd en banc, 735 F.2d 1059 (8th Cir. 1984); *B.J. McAdams, Inc.* v. *ICC*, 551 F.2d 1112, 1114-1115 (8th Cir. 1977).

The only basis that petitioner offers to distinguish *Brotherhood of Locomotive Engineers* is that "an agency decision may be final for one purpose yet nonfinal for another purpose" (Pet. 11), citing *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532 (1970). Petitioner's reliance on *American Farm Lines* is misplaced. In that case, the Court held that "[i]n multi-party proceedings, * * * some may seek judicial review and others may seek administrative reconsideration," resulting in the exercise of jurisdiction over the same order by both the court and the Commission (*id.* at 541). The Court recognized, however, that " '[w]here a motion for rehearing is in fact filed there is no final action until the rehearing is denied' " (*ibid.*, quoting *Outland* v. *CAB*, 284 F.2d 224, 227 (D.C. Cir. 1960)). This Court has never held that the same party may simultaneously pursue judicial review and agency reconsideration.[13] Indeed, to do so would

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[13] Petitioner's effort (Pet. 11) to distinguish *CAB* v. *Delta Airlines, Inc.*, 367 U.S. 316, 326 (1961), and *Outland* v. *CAB*, 284 F.2d 224, 227 (D.C. Cir. 1960), has no merit. In *Delta Airlines*, the Court agreed with "the general notion that an administrative order is not 'final,' *for the purposes of judicial review*, until outstanding petitions for reconsideration have been disposed of" (*id.* at 326 (emphasis in original)).

invite premature judicial consideration of issues that the agency might well resolve, thereby increasing the burden on the courts and disrupting the orderly process of judicial review. See, *e.g.*, *Pennsylvania* v. *ICC*, 590 F.2d 1187, 1192-1194 (D.C. Cir. 1978); *B.J. McAdams, Inc.*, 551 F.2d at 1114-1115. Thus, the court below correctly concluded that the order from which petitioner appealed is not final.[14]

The Court simply found that principle inapplicable in determining whether the CAB could alter a certificate for an airline to operate that had become effective, without providing the hearing required by statute, because the CAB had made the certificate subject to its action on petitions to reconsider (*id.* at 321, 326-327). Moreover, the court in *Outland* made clear that "[w]here a motion for rehearing is in fact filed there is no final action until the rehearing is denied" (284 F.2d at 227). Accordingly, "when a motion for rehearing is made, the time for filing a petition for judicial review does not begin to run until the motion for rehearing is acted upon" (*id.* at 227-228).

[14] Petitioner's contention that the rules of the Commission "contemplate simultaneous petitions to reopen and petitions for judicial review" (Pet. 12) gives those rules an interpretation exactly contrary to their correct meaning. Section 1115.6 (49 C.F.R.) provides, in pertinent part, that "[i]f a[] * * * petition seeking reopening is filed * * * before or after a petition seeking judicial review is filed with the courts, the Commission will act upon the * * * petition after advising the court of its pendency unless action might interfere with the court's jurisdiction." The Commission's rule is fully consistent with the principle that a petition to reopen agency proceedings renders the agency's order nonfinal for purposes of judicial review. By "advising the court" of the petition, the Commission assists the courts in dismissing appeals of nonfinal orders. The Commission's further provision that it will not act when "action might interfere with the court's jurisdiction" simply implements this Court's discussion of the relationship between agency action and judicial review in *American Farm Lines*, 397 U.S. at 541. There, the Court stated that the issuance of temporary relief by a court "does not mean that the Commission loses all jurisdiction to complete the administrative process. It does mean that thereafter the Commission 'is without power to act inconsistently with the court's jurisdiction' " (*ibid.*, quoting *Inland Steel Co.* v. *United States*, 306 U.S. 153, 160 (1939)).

2. Petitioner also argues (Pet. 13-14) that the Commission's initial decision not to reject Winona's filing was a reviewable order, despite the preliminary nature of the ruling and the continuation of revocation proceedings before the Commission. The Commission's refusal to reject Winona's filing, however, is plainly nonreviewable. Allowing judicial review of such an order would be inconsistent with the regulatory scheme, and it would significantly disrupt the Commission's proceedings. Under the Commission's class exemption of all trackage rights transactions from regulation, a railroad is authorized to consummate trackage rights agreements without Commission approval, provided that it notifies the Commission in writing one week prior to consummation (49 C.F.R. 1180.4(g)). Congress has authorized the Commission to rely on its post-consummation revocation powers to nullify any transactions determined not to be entitled to an exemption (see 49 U.S.C. 10505(d)).[15] Because the trackage rights exemption is self-executing, the Commission's decision not to reject Winona's filing merely started the administrative process, not ended it. The decision, therefore, lacks the qualities of administrative finality needed for judicial review. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 239 (1980) (issuance of an administrative complaint is not final agency action).

In addition, Congress intended that the Commission exercise its exemption power to relax "as many as possible of the Commission's restrictions on changes in prices and services by rail carriers" and "adopt a policy of reviewing carrier actions *after the fact* to correct abuses of market

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[15] See *Illinois Commerce Commission* v. *ICC*, 819 F.2d at 315-316; *American Trucking Ass'ns* v. *ICC*, 656 F.2d 1115, 1119-1120 (5th Cir. 1981). The court below recognized this policy (Pet. App. 6a).

power." H.R. Conf. Rep. 96-1430, 96th Cong., 2d Sess. 105 (1980) (emphasis added)). Treating the threshold action of the Commission as a final, reviewable decision would reverse the approach Congress had envisioned and would subject initial Commission decisions, based on incomplete records, to full scale judicial review that would pre-empt the Commission's revocation proceedings. There is no basis for finding finality in these circumstances under the decisions of this Court. See, *e.g.*, *Williamson Co. Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 193 (1985) ("the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury"); *Bell* v. *New Jersey*, 461 U.S. 773, 779-780 (1983) (administrative decision is not final when "judicial review at the time will disrupt the administrative process"); *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970) (finding finality where "the process of administrative decisionmaking has reached a stage where judicial review will not disrupt the orderly process of adjudication" and "rights or obligations have been determined or legal consequences will flow from the agency action").

Contrary to petitioner's contention (Pet. 13), the court of appeals properly analogized this case to *Papago Tribal Utility Auth.* v. *FERC*, 628 F.2d 235 (D.C. Cir. 1980), cert. denied, 449 U.S. 1061 (1980).[16] In that case, the court of appeals held that an agency's denial of a motion to

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[16] *Papago* itself followed this Court's precedents that the Commission's decision to accept or reject a rate filing is not judicially reviewable. See *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 441 U.S. 444 (1979) (Commission decision not to suspend a proposed rate increase is not reviewable); *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963) (courts have no power to suspend railroad rates pending a hearing before the Commission).

reject a rate increase filing with the FERC was not reviewable. FERC's decision not to reject a rate filing closely resembles the Commission's instant decision not to reject a trackage rights notice. Just as the filer in *Papago* could impose a higher rate (after a statutory waiting period), the railroad in this case may consummate a trackage rights arrangement after notifying the Commission. In both cases, judicial review must await the plenary post-consummation proceedings of the agency.

Petitioner suggests (Pet. 13-14) that, even if the Commission's order was not final, the court below erroneously concluded that there was no patent jurisdictional defect in the Commission's refusal to reject Winona's filing. Petitioner's argument (Pet. 14) is that the Commission lacks jurisdiction to authorize the trackage rights under 49 U.S.C. 11343(a)(6) because Winona is not a bona fide carrier. But on the record before it, the court below correctly determined that the Commission's action "does not constitute a clear abuse of discretion or usurpation of power" (Pet. App. 17a). There was ample basis for the court to conclude that the issuance of an extraordinary writ was unwarranted.[17] *In re State of South Dakota*, 692 F.2d 1158, 1160 (8th Cir. 1982) (citing *Ex parte Chicago, Rock Island & P. Ry.*, 255 U.S. 273, 274-276 (1921)). In any event, that fact-bound conclusion does not warrant further review by this Court.

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[17] The court noted that earlier Commission decisions discussing Winona's status as a carrier were "contradictory" and that there was no "well-developed factual record" for the Commission to use in making "its initial decision" (Pet. App. 17a).

CONCLUSION

The petition for a writ of certiorari should be denied.

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